Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DCS SANITATION MANAGEMENT, INC.,
Petitioner,

v.

ELOY CASTILLO, EFREN GEORGE CASTILLO, and ADOLFO MARTINEZ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether a multistate employer, who has contracted for a particular rule of law to govern its employment agreements to promote stability, reliability and certainty among its employees and to protect its investment, training, and goodwill, has constitutionally protected rights to have that chosen law be given effect when there is a reasonable basis for that choice?

Whether the parochial interests of the forum state must yield to the reasonable and justifiable expectations of a multistate employer to have its choice of law and the particular substantive rule of that chosen law govern its employment agreements with its employees located in multiple states when there is a reasonable basis for the choice of law?

In dealing with contracts involving interstate commerce, whether the Constitution mandates a uniform rule requiring a forum court to apply the parties' reasonable choice of a particular state law to govern their contract in order to realize their reasonable and justifiable expectations?

Statement Pursuant to Supreme Court Rule 29.6

Petitioner DCS Sanitation Management, Inc. is a privately owned entity. It has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner DCS Sanitation Management, Inc. ("DCS") respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit dated January 25, 2006 is officially reported at 435 F.3d 892 and is reproduced at App. B. The ruling of the United States Court of Appeals for the Eighth Circuit denying the Petition for Rehearing En Banc and the Petition for Rehearing dated April 4, 2006 is not officially reported and is reproduced at App. A.

The decision and order of the United States District Court for the District of Nebraska dated December 14, 2004 is not officially reported and is reproduced at App. C.

Jurisdiction

This petition is timely under 28 U.S.C. §2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order denying the Petition for Rehearing En Banc and the Petition for Rehearing. This court has jurisdiction to review the order of the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1254.

Constitutional Provisions Involved

The relevant constitutional provisions are Article I, Section 8; Article I, Section 10, Article IV, Section 1 and

Section 1 of the Fourteenth Amendment of the United States Constitution. The relevant constitional provisions are reproduced at App. E.

Statement of the Case

Statement of the Pertinent Facts

A. DCS as a multistate employer with its principal place of business in Cincinnati, Ohio.

As a Delaware corporation employing thousands of employees from Oregon to New York in the highly competitive business of sanitizing food packing and processing plants, DCS must direct, plan, coordinate and implement its operations from its corporate headquarters in Cincinnati, Ohio. With far-flung operations in an industry requiring strict adherence to multiple regulations, implementation of efficient and proficient protocols to complete timely sanitation of multiple plants and precise administration of chemical processes to realize required levels of decontamination, DCS must promulgate uniform and consistent policies, procedures and protocols to *all* of its employees. Those personnel policies, sanitation procedures and industry protocols are trade secrets and confidential, proprietary information promulgated from DCS' corporate offices in Cincinnati, Ohio. From those corporate headquarters, DCS has exported its trade secrets and proprietary information to its employees in the various states, including Nebraska.

To protect its proprietary information, investment, training and goodwill which it created in Ohio and exported to its employees throughout the United States, DCS had its employees, including the respondents (the "Former

Employees"), sign employment agreements (the "Employment Agreements") as a condition of employment. A copy of such an agreement is reproduced at App. D. Pursuant to the Employment Agreements, the Former Employees, like all of DCS' employees, covenanted and agreed in part:

> 4. Noncompetition After Termination: For a period of one (1) year following the date of termination of employment for any reason, I will not directly or indirectly engage in, or in any manner be concerned with or employed by any person, firm, or corporation in competition with Company or engaged in providing contract cleaning services within a radius of one-hundred (100) miles of any customer of Company or with any customer or client of Company ***. In the event of violation of this covenant, Company, in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issued by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

The covenants contained in those Employment Agreements are necessary to protect the legitimate business interests of DCS, including maintaining and protecting the confidential, proprietary information of DCS, the investment in the training of the Former Employees and preservation of the goodwill developed with DCS' customers.

Recognizing that the Employment Agreements were intended to protect DCS' legitimate business interests, in particular the substantial investment made in creating the trade secrets, proprietary business information and goodwill

made available during their employment, DCS included the provision that the terms of the Employment Agreements would be "subject to and interpreted in accordance with the laws of the State of Ohio". This single provision in all of DCS' employment agreements embodied the benefits of uniformity, certainty and predictability in the rights and benefits of both parties to that bilateral contract. This single provision allowed DCS to trust its employees and work together to expand output and competition in interstate commerce.

B. Packers assumes responsibility for cleaning Plant with DCS' proprietary information and investment.

For 18 years, DCS cleaned the processing side of the Tyson Foods plant in Dakota City, Nebraska (the "Plant"). In June, 2003, Tyson Foods solicited bids from competitors to clean the processing side of the Plant. On September 18, 2003, Tyson Foods elected not to renew DCS' contract and chose Packers Sanitation Services, Inc. ("Packers") to clean the Plant commencing November 7, 2003. On November 8, 2003, Packers began cleaning the processing side of the Plant.

Rather than recruit and assemble its own crew, Packers hired all of DCS' employees, including the Former Employees. With the hiring of the entire DCS crew, including the Former Employees, an uncommon experience in this industry, Packers was able to realize significant cost savings and efficiencies and provide quality, uninterrupted service without experiencing the usual disruptions accompanying cleaning a new plant. With DCS' trained senior managers in the exact positions they had held for more than 15 years, Packers could take advantage of the knowledge, skill, training and investment that DCS had made and minimize the risk of damaging the goodwill with the

customer. As Packers' personnel manager readily conceded, the real advantage to hiring the senior management are the available efficiencies and the cost savings. "It, simply, shortens the learning curve and reduces costs."

C. The Decisions Below

The clear and unambiguous choice of law provision in the Employment Agreements expressed the parties' intentions to have post-employment obligations construed, interpreted and applied in accordance with Ohio law. In multistate transactions the justified expectations of the parties to foretell with accuracy their rights and liabilities under the contract is best attained by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of law, persons are free within broad limits to determine the nature of the contractual obligations. However, the district court permitted perceived parochial interests to eviscerate the parties' choice of law when there was a reasonable basis for that choice of law.

Likewise, the Court of Appeals affirmed the eradication of the parties' choice of law. In a contract between citizens of different states, the Court of Appeals would not permit the parties to choose the law to govern the validity of the contract and the rights created thereby. The Court concluded that the policy of certainty, predictability and convenience engendered in the parties' power to choose the law of Ohio to govern their contract "is inapplicable in this case, because, under Nebraska law, the parties could not have resolved to apply Ohio law even with an explicit provision." Compounding this fundamental error, the Court concluded that the objectives of

contract law to protect justified expectations and to foretell with accuracy the rights and liabilities under the contract could not have been realized because "Ohio has no substantial relationship to the parties or the transaction." Exacerbating these errors, the Court concluded that certainty, predictability and convenience were to be trumped because "application of Ohio law would violate a fundamental policy of Nebraska law." These three conclusions, however, are contrary to the fundamental right of the parties to contract to protect their goodwill and investment, impose an unreasonable burden on interstate commerce, defeat the reasonable expectation of the parties, violate due process, infringe the Full Faith and Credit Clause and contradict the reasoning of other Circuit Courts of Appeal.

Reasons for Granting the Petition

Conflict of law rules implicate fundamental constitutional provisions including the Commerce Clause of Article I, Section 8, which limits the power of a State to apply its local law to interstate transactions, the Contract Clause of Article I, Section 10, which limits the power of a state to impair obligations of contracts, the Full Faith and Credit Clause of Article IV, Section 1, which limits the extent to which a state may ignore the law of the sister state and the Due Process Clause of Section 1 of the Fourteenth Amendment, which limits the extent to which a State may deprive the citizens of a sister State of property without due process of law. *Restatement of Conflict of Laws* 2d ("Restatement"), §2. As one commentator observed, "Choices of law rules may not prefer local citizens to citizens of a sister state, ... And they may not prefer forum law to the law of sister states, that is the principle of [the Full Faith and Credit Clause]." D, Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Columbia L.

Rev. 249, 251 (1992). To accommodate such constitutional protections and assure that multistate transactions are not unreasonably burdened with parochial limitations, the choice of the applicable rule of law must be animated with considerations for the protection of the parties' justified expectations; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.

"Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern *the validity of the contract* and *the rights created thereby*." *Restatement* §187, Comment e (emphasis added). "[T]he values of certainty, predictability and uniformity of result are closely linked with the protection of parties' expectations that their contractual choice of law will be honored because "unless these values are attained, the expectations of the parties are likely to be disappointed." *Barnes Group, Inc. v. C & C Producers, Inc.*, 716 F. 2d 1023, 1040 (4th Cir. 1983) (Murnagham, J. concurring in part and dissenting in part). Permitting the parties to realize their justified expectations in their contractual obligations transcends the parochial and effectuates the constitutional protections embodied in the conflict of law rules. However, the court of appeals eviscerated the fundamental right of the parties to determine the nature of their obligations; attenuated the certainty, predictability and uniformity of result; denigrated the constitutional protections animating conflict of law rules; and was in conflict with authoritative decisions of every other United States Court of Appeals that has addressed the issue.

"A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern to this Court's review of choice-of-law decisions under the Due Process Clause." *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring). Likewise, the justifiable expectations of the parties "may also implicate State interests cognizable under the Full Faith and Credit Clause." *Id.* at 324, n. 11 citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

"Contracting parties can, of course, make their expectation explicit by providing in their contract either that the law of a particular jurisdiction shall govern questions of contract interpretation or that a particular substantive rule ... shall or shall not apply." *Id.* at 328 (Stevens, J., concurring) (footnotes omitted). Here, the expectation of the parties was to have the Employment Agreements, and in particular the post-employment obligations set forth in those contracts, construed, interpreted and applied in accordance with Ohio law. This choice of Ohio law is further confirmed by the parties' agreement that a court of law enforcing any covenant should modify or reform the obligations as necessary "to create an obligation to the full extend (sic) permitted by law." Under Ohio law, courts are empowered to modify or amend employment agreements in order to achieve a reasonable covenant restraining a former employee from competing with a former employer. *Raimond v. Van Vlerah*, 42 Ohio St. 2d 21, 25, 325 N.E.2d 544, 547 (1975). ("Courts are empowered to modify or amend employment agreements to achieve such results."). "[T]he fact that the contract ... makes reference to legal doctrines that are peculiar to the local law of a particular state ... provide[s] persuasive evidence that the parties wish to have this law applied."

Restatement, §187, Comment a. Given the explicit reference to Ohio law and the parties' preference for reformation, the "law of the state chosen by the parties to govern the contractual rights and duties will be applied ...". *Restatement*, §187(1). Clearly, the parties had made their expectations explicit.

In the context of interstate transactions, particularly employers who are engaged in business in multiple states, the choice of the same governing law permits uniformity of application, consistency in administration and equality in result. This Court must take into account the chaotic employment conditions under which employees would have to work if employers were unable to treat their workers uniformly. Those in some states would be bound to comply with their contractual undertakings, while others would be free to enjoy substantial advantages, negotiating favorable terms with competitors by which the knowledge and contacts gained through working for an employer could be diverted to them. "Bruised feelings and jealousies would be inevitable. Worse, the restrictive covenants might well, practically speaking, in order to promote tranquility, have to be eliminated in *all* contracts, even those entered into with managers working in states which permit such covenants." *Barnes Group*, 716 F. 2d at 1041, n. 9 (Murnagham, J., concurring in part and dissenting in part).

As a multistate employer with employees from Oregon to New York, DCS has considerable interest in the application of one state's contract law to all of its employment agreements. As it currently engages in business in 20 different states, DCS could conceivably have 20 different forms for its employees working in the same position with totally different restrictions and obligations. The practical problems would increase if employees were moved to jobs in different states

or if an employee left DCS and sought employment in violation of a covenant not-to-compete in a different state where he was employed. Having multiple non-compete and non-piracy provisions throughout the United States would impose a great administrative burden on DCS and similarly situated multistate employers. Ultimately, these conflicting rules and regulations would serve to undermine the efforts of management at DCS and other similarly situated employers to make reasonable business judgments on the scope and terms that are necessary to protect the proprietary interest and goodwill of their companies.

In addition to promoting consistency and uniformity in employment, the choice of the same governing law enables multistate employers to protect their investment in business plans, policies and procedures, training and trade secrets. Multistate employers create proprietary information, strategic business plans, policies and procedures, training and development which they export throughout the United States where they do business. To assure uniformity and consistency in the protection of that investment, employers will include a choice of law in their employment agreements. The selection of such law creates a reasonable expectation that their investment, practices and property will be uniformly protected. For example, DCS created proprietary information in Ohio which it exported to Nebraska. Sanitation and safety programs were designed in DCS' corporate office in Ohio. Formulation of processes and procedures designed to improve the efficiency of cleaning crews in Nebraska were made at DCS' corporate office in Ohio. Staffing and manning for cleaning crews in Nebraska were planned at DCS' corporate office in Ohio. Investment of time and money to train and develop employees into effective and efficient managers were made at DCS' corporate office in Ohio. DCS exported all of these assets to Nebraska and intended to protect those assets,

in part, with the post-employment obligations contained in the Employment Agreements to be governed under Ohio law.

A multistate employer, therefore, will have a reasonable expectation that a choice of law clause intended to bring stability in the hurly burly of interstate employment and protection for its investment exported throughout the United States will be enforced provided that the chosen law has some substantial relationship to the parties. "When the state of the chosen law has some substantial relationship to the parties of the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case ... when the state is ... where one of the parties is domiciled and has its principal place of business." *Restatement*, §187, Comment f. When a multistate employer has such a reasonable basis for its choice of law, that employer has justifiable expectations which cannot be frustrated without violating the constitutional provisions animating choice of law. Therefore, a court cannot choose to vitiate that choice of law. Instead, a court must adhere to and give effect to that choice of law.

Just as materially enlarging the contractual obligations of one of the parties where there is no expectation of such enlargement is violative of due process, *see*, e.g. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), equally pernicious is materially contracting the obligations where there is no expectation of such contraction. Under either scenario, expectations are frustrated and obligations are altered. Each equally deprives the party of the benefit of the bargain made and deprives the party of constitutional rights.

Unlike other cases this Court has considered, this case presents a multistate employer who had a reasonable basis for its choice of law, made its expectations known by express provision in the contract, included a particular substantive

rule of contract law to reaffirm its expectations, sought to enforce that choice of law against parties to the contract and not third parties and yet was denied its reasonable expectations. For example, in *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), the Court allowed the lower court's choice of forum law to override an express contractual limitation. "The Court emphasized the fact that the insurer had issued the insurance policy with the knowledge that it would cover the insured property wherever it was taken. *Id.*, at 181-182. The Court also noted that the insurer had not attempted to provide in the policy that the law of another State would control. *Id.*, at 182." *Allstate*, at 329 n. 20. Likewise, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 68 (1954), the Court found that neither the Due Process Clause nor the Full Faith and Credit Clause prevented the Louisiana courts from applying forum law to permit a direct action against the insurer prior to determination of the insured's liability. "An additional, although unarticulated, factor in *Watson* was the fact that the litigant urging that forum law be applied was not a party to the insurance contract. While contracting parties may be able to provide in advance that a particular rule of law will govern disputes between them, their expectations are clearly entitled to less weight when the rights of third-party litigants are at issue." *Allstate* at 329, n. 20 (Stevens, J., concurring). Where a multistate employer does provide in advance that a particular rule of law will govern the disputes arising from an employment agreement, and there is a reasonable basis for that choice and that choice is intended to promote stability and uniformity among employees and protect the employer's investment and goodwill, a court must give effect to that choice of law. To do otherwise would violate the Due Process Clause of the Fourteenth Amendment and impose unreasonable burdens on contracts made in interstate commerce.

A uniform choice of law effecting consistency and predictability in interstate transactions also implicates the Full Faith and Credit Clause.

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations...and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee County v White Co., 296 U.S. 268, 276-277 (1935). "The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States, and avoid infringement upon their sovereignty." *Allstate*, at 322 (Stevens, J., concurring). "Discrimination against citizens of sister states, justified only by a preference for locals or a view that the state has no interest in protecting outsiders, undermines our tendency to think of ourselves as a single people and leaves the victims with a legitimate sense of raw injustice." D. Laycock, *Equal Citizens*, 92 Columbia L. Rev. at 264; *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (The Full Faith and Credit Clause was intended to prevent "parochial entrenchment on the interest of other states.").

To permit parochial interests to trump reasonable expectations creates substantial incentives for forum shopping and leaves reasonable business people uncertain of what law is applicable to their conduct until a lawsuit is filed. This prediction has become an epidemic. M. Cheskin, *"Employment law when distance is no object"*, Midwest

Construction Law @ midwestconstructionlaw.com (2006); D. Benson, *National Forum Shopping Restrictive Covenants*, Bloomberg Corporate L. Journal 91 (2006); D. Benson, et al., *"New Race to Tennessee and Georgia Courthouses Over Non-Competition Agreements"*, 41 Tenn. Bar J. 18 (2005). Now the race to the courthouse and not the choice of law decides the enforceability of post-employment obligations. One example illustrates the length to which state laws are trumping reasonable expectations.

In *Keener v. Convergys Corp.*, 205 F. Supp.2d 1374 (S.D. Ga. 2002) *aff'd in part and rev'd in part* 342 F.3d 1264 (11th Cir. 2003), James Keener filed an action in the district court seeking a declaration that the non-compete he signed was unenforceable. Keener also sought an injunction to restrain Convergys from even trying to enforce the non-compete. Keener had been working for a predecessor of Convergys in 1994 in Ohio. In 1995, Keener, who at the time was not a Georgia citizen, signed a non-compete as a condition of his continued employment, which contained an Ohio choice-of-law provision. Keener remained employed with Convergys in Ohio and then Illinois until he voluntarily resigned in March 2001, when he accepted employment with a competitor in Georgia. Despite a contract negotiated in Ohio, performed in Ohio and a provision that Ohio law would determine the obligations of the agreement, the district court ruled that the choice-of-law provision would not be enforced. Effectively, the district court permitted Keener to shop the forum in order to obtain a result contrary to what had been expected when the parties first negotiated the agreement. The court even observed: "This may wind up encouraging non-Georgia employees to 'flee to Georgia' to shed their [non-compete agreements]." *Id.*, 205 F. Supp.2d at 1379. Likewise, one of the Former Employees was a resident of Iowa. He could shop for a forum for declaration of his rights

under his Employment Agreement in Nebraska, Iowa or Ohio. The result, however, would be left to the whims of local law.

The cure recommended by one commentator was:

> Eliminating forum preference altogether is the only constitutional solution. The forum cannot apply its own law in all cases, or in all cases of true conflicts. The forum cannot apply its own law in all cases with which it has reasonable contacts, or all cases in which it has an interest, or all cases in which no one would be unfairly surprised. If an employer hired black applicants only when they were clearly superior to the white applicants, and hired whites whenever the comparison between applicants was fairly debatable, we would easily conclude that the employer discriminated. Similarly, when a forum prefers its own law in fairly debatable choice-of-law cases, it is discriminating against the law of sister states and denying the equal status of sister-state law. Whatever criteria are invoked to identify close or debatable cases, forum law cannot be the tiebreaker. Under the Full Faith and Credit Clause, the identity of the forum is irrelevant to choice of law.

D. Laycock, *Equal Citizens*, 92 Columbia L. Rev. at 311.

DCS does not recommend such radical surgery to cure this cancer. Instead, DCS urges that the Court mandate that a choice of law in a contract in interstate commerce based on a reasonable connection to the parties and intended to promote reliability, certainty and equality in contract administration cannot be trumped by the parochial interest of the forum law. Rather, a court must give effect to the parties' choice of law.

This Court has already precluded parochial interests from trumping contract provisions which assure certainty and predictability of result in interstate commerce. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Court found a forum clause included in the "terms and conditions" to a ticket for passage on a cruise ship to be "permissible for several reasons:"

> Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. *** Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.

Id. at 593-594 (citations omitted). Likewise, a choice of law clause in a standard contract designed to promote equality and consistency among employees and to protect proprietary information, investment, training and goodwill exported throughout the United States has the salutary effect of dispelling any confusion about what law will govern the parties' duties and obligations under the contract. Such a clause would also spare the litigants and the court the time and expense of litigating the conflict of law question.

Not only may the forum be chosen by contract, the statute of limitations may also be contracted. In *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1946),

the Court acknowledged:

> ...a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period. Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the Fourteenth Amendment under appropriate circumstances.

Given the current state of the law in the Eighth Circuit, however, a multistate employer with a substantial relationship to a state, for example, Ohio, could have elected to have all disputes related to its employment agreements resolved in an Ohio court and subject to shortened time limits but could ***not*** have elected to have the obligations of those agreements governed by Ohio law. Like a valid forum-selection clause, enforcement of a choice of law clause, bargained for by the parties, "protects their legitimate expectations and furthers vital interests of the justice system." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring). "Courts should announce and encourage rules that support private parties who negotiate such clauses." *Id.* at 33.

While the Court has decided that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy" *Nevada v. Hall*, 440 U.S. 410, 422 (1979), the choice of Ohio law in this case would not violate Nebraska public policy. The law of Ohio and the law of Nebraska share the same criterion to judge the validity of post-employment covenants not-to-compete. *See Lake Land Emp. Group of Akron v. Columber*,

101 Ohio St. 3d 242, 248, 804 N.E.2d 27, 33 (2004) and *Mertz v. Pharmacists Mutual Ins. Co.*, 261 Neb. 704, 711, 625 N.W.2d 197, 204 (2001). In addition to the common criterion, the law of Ohio and the law of Nebraska share the same objective of contract construction. *See Aultman Hospital Assn. v. Hospital Care Corp.*, 46 Ohio St. 3d 51, 53 544 N.E.2d 920, 923 (1989) and *T. V. Transmission v. City of Lincoln*, 220 Neb. 887, 890, 374 N.W.2d 49, 52 (1990). Likewise, judicial reformation is not a substantial public policy of Nebraska which would vitiate the choice of Ohio law.

While Nebraska courts have at times refrained "from modifying the covenant in an effort to make it reasonable", *see Ecolab, Inc. v. Morisett*, 879 F.2d 325 (8th Cir. 1989) citing *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), contract reformation is not *per se* violative of Nebraska public policy. *See Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). The Nebraska Supreme Court has been willing to enforce a covenant not-to-compete within a reasonable geographic area. *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 423, 106 N.W.2d 456, 467 (1960). ("A contract in restraint trade in which the territory is unreasonably extensive may be divisible as to space and enforced in equity within a reasonable area."). Whether reformed or narrowly reinforced, the result is the same, judicial enforcement of a post-employment covenant.

In fact, the law of Nebraska makes clear that the remedy of judicial reformation, which would lead to a different result, is *not* a fundamental public policy. "In deciding choice of law questions, Nebraska follows the Restatement (Second) of Conflict of Laws." *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001) citing *Harper v. Silva*, 224

Neb. 645, 399 N.W.2d 826 (1987). The *Restatement* makes clear that the "result" cannot be a basis to refrain from applying the chosen law. *Restatement*, §187, Comment g ("The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law."). Moreover, Nebraska's reluctance to adopt a uniform rule favoring reformation of restrictive covenants does not itself constitute a fundamental state policy contemplated by the *Restatement*.

Applying Ohio law, therefore, would not only be consistent with the expressed intentions of the parties, applying Ohio law would be consistent with the public policies of Nebraska as expressed in and through the Restatement.

> Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. The objectives may best be attained in multi-state transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of the contractual obligations.

Restatement, §187, Comment e. In fact, abrogating a reasonable choice of law without any countervailing public policy amounts to discrimination and denial of equal protection under the Full Faith and Credit Clause and in effect

impairs otherwise valid contracts.

In addition to voiding the choice of law and depriving the parties of their fundamental constitutional rights, including materially impairing DCS' ability to conduct business in interstate commerce, and defeating its reasonable expectations, the opinion of the Court of Appeals is in stark conflict with every other Circuit Court of Appeal which has concluded that the principal place of business of a corporation *alone* was a substantial relationship to that state for the parties to select the law to govern their interstate contractual obligations and enforce the parties' choice of law. *Kruzits v. Visco*, 40 F.3d 52 (3rd Cir. 1994); *Curtis 1000, Inc. v. Suess*, 24 F.3d 941 (7th Cir. 1994); *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463 (1st Cir. 1992); *Woodling v. The Garret Corp.*, 813 F.2d 543 (2nd Cir. 1987).

In *Kruzits*, the Third Circuit gave effect to the parties' choice of law reasoning:

> In the commercial world, where an Illinois company, such as Heller, finances purchases of commodities, machinery, and equipment in many, if not all, of the states in the nation, it is understandable and reasonable that Heller include choice of law provisions in its financial agreements to ensure that those agreements are governed by the law of its principal place of business rather than the laws of each and every state where its borrowers do business.

40 F.3d at 56. In *Suess*, the Seventh Circuit concluded that the state of the principal place of business alone has a sufficient connection with the contract to enforce the parties' choice of law because the state of the principal place of

business has as much interest in regulating the out of state operations of "its" firm as the foreign state has in protecting its citizens. 24 F.3d at 948-949. In *Ferrofluidics*, the First Circuit observed that a party's principal place of business was "a contact sufficient to allow the parties to choose that state's law to govern their contract." 968 F.2d at 1467-1468. In deciding to give deference to the parties' choice of law, the Court cautioned against nullification:

> When the parties take the trouble to make a contractual choice of law, often it is because they do not want to have applied, by operation of the general rule, the law of some other jurisdiction with the "most significant" relationship to the contract. If a court can nullify a contractual choice of law merely on the ground that another jurisdiction has a more significant relationship to the transaction than the chosen jurisdiction, the courts can nullify virtually any contractual choice - and do so for the very reason the parties chose to do otherwise.

Id. at 1467. Likewise, the Second Circuit held in *Woodling* that the state of the principal place of business is a reasonable relationship for the Court to honor the parties' choice with regard to matters of substance. 813 F.2d at 552.

If different states make different judgments, the goals of uniformity and predictability cannot be fully met, the law's role as a source of enforceable norms is weakened and the constitutional principles outlined above are undermined. D. Laycock, *Equal Citizens*, 92 Columbia L. Rev. at 331. "Thus, the constitutional scheme for allocating authority among the states is not complete without an allocation of authority to specify choice-of-law rules." *Id.* at 331. This Court has already observed: "To vest the power of

determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Authority to specify choice-of-law rules should also not reside exclusively in the states, because each state is equal to all the others and no state's view should control. "And states tend to be biased in favor of their own citizens and their own law; that is why we needed the Privileges and Immunities and Full Faith and Credit Clauses in the first place." D. Laycock, *Equal Citizens*, 92 Columbia L. Rev. at 331. Consequently, this Court must assume responsibility for articulating clearly a fundamental choice of law rule intended to promote goals of uniformity and predictability as well as fulfilling the law's role as a source of enforceable norms and adhering to fundamental constitutional principles.

The Court is not usurping authority. Rather, the Court is fulfilling its responsibility to implement the territorial division of authority among the states; assuring that the reasonable expectations of multistate employers are not frustrated; and that parochial interests do not trump a party's choice of law. Where a party has chosen a law or set of laws which have reasonable connection to the parties and which promotes consistency and equality and protects that party's investments, that choice of law should be enforced without regard for the law of the forum. Only such a rule can assure fundamental constitutional principles this Court has recognized in its choice of law cases. Only such a rule protects the integrity of contracts, precludes unreasonable burdens on interstate commerce, respects the reasonable expectations of the parties, assures those expectations are not subjected to parochial vexations, and is consistent with the Due Process and Full

Faith and Credit Clauses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-1201

[Filed April 4, 2006]

DCS Sanitation Management, Inc., Appellant,	)
v.	)
Eloy Castillo, et al., Appellees.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1201

[Filed January 25, 2006]

DCS Sanitation Management, Inc., Appellant,	)
v.	)
Eloy Castillo; Efren George Castillo; Adolfo Martinez, Appellees.	)

Appeal from the United States District Court
for the District of Nebraska
Case No. 8:01CV222

Before RILEY, JOHN R. GIBSON, and COLLOTON, Circuit Judges

OPINION

RILEY, Circuit Judge.

DCS Sanitation Management, Inc. (DCS) sued three of its former employees, Eloy Castillo, Efren George Castillo, and Adolfo Martinez (collectively, former employees), alleging the former employees breached noncompete agreements. DCS appeals the district court's[1] denial of DCS's motion for a preliminary injunction and grant of summary judgment in favor of the former employees. We affirm.

I. BACKGROUND

DCS, a Delaware corporation with its principal place of business in Ohio, cleans food processing plants in thirteen states, including Nebraska. DCS's corporate office in Ohio (1) formulates processes and procedures to improve cleaning crew efficiency, (2) designs sanitation and safety programs for all cleaning crews, (3) makes staffing decisions for all cleaning crews, and (4) makes human resource policies and decisions for all DCS employees.

The former employees worked for DCS as on-site managers at the Tyson Foods plant in Dakota City, Nebraska (Tyson plant). The former employees (1) had access to DCS's staffing, sanitation, and safety programs, including the allocation and monitoring of proper chemical dilutions; (2) were responsible for enforcing regulatory safety requirements and satisfying third party audit requirements; (3) were familiar with staffing requirements for cleaning the

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[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

Tyson plant; and (4) had knowledge of the Tyson plant's key contacts and business requirements.

As a condition of employment with DCS, each of the former employees signed identical employment agreements (Agreements) with DCS. The Agreements contained the following noncompete provision:

> NONCOMPETITION AFTER TERMINATION: For a period of one (1) year following the date of termination of employment for any reason, I will not directly or indirectly engage in, or in any manner be concerned with or employed by any person, firm, or corporation in competition with [DCS] or engaged in providing contract cleaning services within a radius of one-hundred (100) miles of any customer of [DCS] or with any customer or client of [DCS] or any entity or enterprise having business dealings with [DCS] which is then providing its own cleaning services in-house or which requests my assistance or knowledge of contract cleaning services to provide its own cleaning services in-house. In the event of violation of this covenant, [DCS], in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issued by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

The Agreements also contained a choice-of-law provision: "APPLICABLE LAW: This Agreement shall be subject to and interpreted in accordance with the laws of Ohio."

In June 2003, after DCS cleaned the processing side of the Tyson plant for eighteen years, the Tyson plant solicited bids from competing cleaning companies. As a result of the bidding process, on September 18, 2003, the Tyson plant selected Packers Sanitation Services, Inc. (Packers) for the cleaning contract. Packers hired all of DCS's employees, including the former employees, and on November 8, 2003, Packers started cleaning the Tyson plant.

On May 14, 2004, DCS sued the former employees, alleging (1) breach of the noncompete agreements, (2) a "substantial probability" the former employees would disclose DCS's trade secrets and confidential information, and (3) breach of contract. DCS sought (1) to enjoin the former employees in accordance with the noncompete agreements, (2) to enjoin the former employees from disclosing DCS's trade secrets and confidential information, and (3) money damages.

DCS moved for a preliminary injunction, and the former employees moved for summary judgment. The district court denied DCS's motion for a preliminary injunction and granted summary judgment in favor of the former employees, concluding Nebraska has a materially greater interest in the noncompete agreements at issue, and application of Ohio law would violate a fundamental policy of Nebraska law. The district court thus applied Nebraska law to determine the validity of the noncompete agreements and concluded the noncompete agreements were overbroad and, therefore, unenforceable.

DCS appeals the district court's ruling, urging this court to reverse the district court's entry of summary judgment and denial of a preliminary injunction, and to remand with instructions to enjoin the former employees under Ohio law.

DCS argues reversal and remand is warranted here, because (1) the district court erred in applying Nebraska law instead of Ohio law, (2) the noncompete agreements are enforceable under Ohio law, and (3) the district court abused its discretion in denying injunctive relief for the period of the covenant from the date of the court's order. In response, the former employees contend (1) the appeal is moot, (2) the district court correctly applied Nebraska law, (3) the noncompete agreements are overly broad and unenforceable, and (4) the noncompete agreements are contracts of adhesion.

II. DISCUSSION

A. Mootness

The former employees contend this appeal is moot, because the one-year time frame of the noncompete agreements has expired. *See Agrigenetics, Inc. v. Rose*, 62 F.3d 268, 270-71 (8th Cir. 1995) (holding, under Nebraska law, when a noncompete agreement's time period runs out, an appeal from the denial of a preliminary injunction is moot). Although an appeal from a denial of injunctive relief may become moot by the passage of time, a claim for damages remains viable. *See Curtis Indus., Inc. v. Livingston*, 30 F.3d 96, 97 (8th Cir. 1994). Because DCS sought money damages in addition to injunctive relief, this appeal is not moot.

B. Choice-of-Law Determination

DCS argues the district court erred when it evaluated DCS's claim under Nebraska law rather than Ohio law, because the Agreements specify Ohio law governs. A district court sitting in diversity jurisdiction applies the conflict of law rules for the state in which it sits. *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001) (citing

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). Thus, we apply Nebraska's conflict of law rules and review de novo the district court's choice-of-law determination. *Id.*

In deciding choice-of-law questions, Nebraska follows the Restatement (Second) of Conflict of Laws (Restatement). *Id.* Nebraska courts generally give effect to the parties' choice of law. *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648, 651 (Neb. 1995); Restatement § 187(1). Restatement section 187(1) provides "the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement § 187(1). Section 187(2) provides the parties' contractual choice of law will apply unless (1) "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," or (2) "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement § 187(2)(a), (b).

The district court applied Restatement section 187(2) without analyzing whether section 187(1) or section 187(2) applies in this case. Section 187(2) applies only when section 187(1) does not govern. *See* Restatement § 187, comment d. Section 187(1) is inapplicable in this case, because, under Nebraska law, the parties could not have resolved to apply Ohio law even with an explicit provision. *See CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652, 656 (Neb. 1994) (holding "the provision of the agreement which states

that a court may reform the covenant is of no effect. Private parties may not confer upon the court powers which it does not possess."); *see also Baxter Intern., Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992).

The first condition under section 187(2), whether "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," is met in this case. Restatement § 187(2)(a). Nebraska has a substantial relationship to the parties and the transaction, because the former employees and DCS entered into the Agreements in Nebraska, the services at issue were to be performed in Nebraska, the former employees reside in Nebraska, the prohibition of the noncompete clause directly and materially affects employment in Nebraska, and DCS does business in Nebraska. Nebraska clearly possesses a direct and substantial interest in the employment of its citizens. The only relationship between Ohio and the parties is the location of DCS's corporate headquarters and principal place of business in Ohio. The Agreements were not negotiated, entered into, or performed in Ohio. Under these circumstances, the district court properly concluded Ohio has no substantial relationship to the parties or the transaction, and Nebraska has a greater material interest in the Agreements. *See Powell v. Am. Charter Fed. Sav. & Loan Ass'n*, 245 Neb. 551, 514 N.W.2d 326, 332 (Neb. 1994) (deciding the state with the most significant relationship to the transaction and the parties is the state where the parties contracted, negotiated, and resided; where the subject matter was located; and where performance was to take place).

The second condition also is satisfied. Under section 187(2)(b), application of the chosen law is precluded if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially

greater interest than the chosen state" when the factors articulated in section 188[2] are applied. Restatement § 187(2)(b). Nebraska and Ohio courts have materially different approaches to the reformation of unreasonable noncompete agreements. In Nebraska, if a court determines a noncompete agreement is unreasonable, the court will not reform the noncompete agreement in order to make it enforceable. *H & R Block Tax Servs., Inc., v. Circle A Enters., Inc.*, 269 Neb. 411, 693 N.W.2d 548, 552 (Neb. 2005). Contrary to the Nebraska courts' approach, Ohio courts are empowered to reform overly broad or unreasonable noncompete agreements to make them reasonable. *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 325 N.E.2d 544, 547 (Ohio 1975). The district court correctly recognized that because Nebraska courts expressly have rejected judicial reformation of noncompete agreements, application of Ohio law would violate a fundamental policy of Nebraska law.

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[2] Section 188 provides in pertinent part:

> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Because Nebraska has a greater material interest in the Agreements and application of Ohio law would violate a fundamental policy of Nebraska law, we hold the district court correctly applied Nebraska law to the question of the validity and enforceability of the noncompete agreements. *See First Nat'l Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358, 363 (Neb. 1993) (disregarding choice-of-law provision because the chosen state had no contacts with the transaction and the parties, and application of the chosen state's law would offend a strong public policy in the forum state). *See also Rain & Hail Ins. Serv., Inc. v. Casper*, 902 F.2d 699, 700-01 (8th Cir. 1990) (applying Nebraska law to an employment agreement's noncompete clause choosing the application of Iowa law, which allowed modification of overly restrictive noncompete provisions, and affirming conclusion "Iowa law would be contrary to a fundamental policy of Nebraska").

C. Validity of the Noncompete Agreements

Having concluded Nebraska law applies, we now turn to whether the noncompete agreements are valid under Nebraska law. Pursuant to Nebraska law, a noncompete agreement is valid if it is (1) "not injurious to the public," (2) "not greater than is reasonably necessary to protect the employer in some legitimate interest," and (3) "not unduly harsh and oppressive on the employee." *Prof'l Bus. Servs. Co. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176, 184 (Neb. 2004) (quotation omitted). "An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee." *Id.* at 185. A noncompete agreement "may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former

employee actually did business and has personal contact." *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751, 756 (Neb. 1987).

We conclude the district court properly held the noncompete agreements were overbroad and unenforceable. The district court recognized the noncompete agreements prohibit the former employees from, directly or indirectly, being concerned in any manner with any company in competition with DCS, and from providing contract cleaning services within one hundred miles of any entity or enterprise "having business dealings" with DCS, including attorneys, accountants, delivery services and the like. The breadth of the noncompete agreements effectively put the former employees out of the cleaning business within an extensive region. We hold the district court did not err in concluding Nebraska courts would not enforce such overly broad noncompete agreements. *See Rosno*, 680 N.W.2d at 186-87 (holding noncompete agreement was overly broad where the agreement prohibited the former employee from soliciting or contacting any of the former employer's clients and where the former employer could not establish the former employee had done business with or had substantial personal contact with all of the former employer's clients); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197, 205 (Neb. 2001) (holding noncompete agreement was overly broad where it was not limited to clients with whom the former employee actually did business or personally contacted); *Moore v. Eggers Consulting Co., Inc.*, 252 Neb. 396, 562 N.W.2d 534, 540 (Neb. 1997) (holding noncompete agreement was overly broad where it prohibited soliciting or accepting business opportunities with any client of the former employer with whom the former employee worked or had knowledge of, and where the agreement contained an overly broad geographical restriction); *Whitten v. Malcolm*, 249 Neb. 48,

541 N.W.2d 45, 48 (Neb. 1995) (holding noncompete agreement was overly broad where it prohibited practicing dentistry within geographic location and was not limited to clients with whom the former employee did business and had personal contact and was not even limited to the former employer's existing customer base); *Vlasin v. Len Johnson & Co., Inc.*, 235 Neb. 450, 455 N.W.2d 772, 776 (Neb. 1990) (holding noncompete agreement was overly broad where it prohibited the former employee from entering into insurance business within fifty miles and was not limited to the former employer's clients with whom the former employee did business and had personal contact); *Polly*, 407 N.W.2d at 756 (holding noncompete agreement was overly broad where it prohibited soliciting or working for the former employer's clients with whom the former employee did not work and did not even know).

III. CONCLUSION

Therefore, we affirm the well reasoned judgment of the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CASE NO. 8:04CV222

[Filed December 14, 2004]

DCS SANITATION MANAGEMENT, INC., Plaintiff,	)
v.	)
ELOY CASTILLO, EFREN GEORGE CASTILLO, and ADOLFO MARTINEZ, Defendants.	)

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on two motions. Shortly after this case was filed, the Plaintiff filed a motion for a preliminary injunction. (Filing No. 9). The Defendants oppose the motion. More recently, the Defendants filed a motion for summary judgment that the Plaintiff opposes. (Filing No. 30). The parties have fully briefed the issues, and they have submitted evidence in support of their positions.

For the reasons that follow, the motion for preliminary injunction is denied, and the motion for summary judgment is granted.

The Defendants Eloy Castillo, Efren George Castillo, and Adolfo Martinez are former employees of the Plaintiff, DCS Sanitation Management Services, Inc. (hereafter "DCS"). The Defendants had been employed by DCS as on-site managers assigned to cleaning the processing side of the Tyson Meat Packing plant in Dakota City, Nebraska. In 1995, the Defendants executed agreements with DCS that contained both noncompetition and confidentiality provisions and that provided for both injunctive relief and liquidated damages in the event of a breach. The Defendants left DCS in November 2003, to begin employment with another cleaning company. DCS's Complaint alleges that the Defendants breached the agreements and that DCS is entitled to relief.

The Defendants have moved for summary judgment based on four arguments, 1) that the Defendants, all of whom are Hispanic, did not possess sufficient understanding of the English language to be able to read and understand the employment agreements; 2) that the covenants contained in the agreements are overbroad; 3) that the matter is moot because DCS did not bid the cleaning contract at issue; and 4) that the case is barred by the doctrine of collateral estoppel. Of these four, I find that only one warrants significant analysis here: whether the covenants are overbroad and unreasonable and, therefore, void as a matter of law.[1]

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[1] With regard to the other three arguments, I note briefly the following. A genuine issue exists regarding the extent to which the Defendants understood the agreements that they executed, and, for that reason, summary judgment is not appropriate on that basis

Undisputed Facts

In June 2003, Tyson solicited bids from other cleaning and sanitation companies for the Dakota City plant. At that time, DCS had the contract for the meat processing side of the plant, and Packers Sanitation Service, Inc. ("PSSI")[2] had the contract for the slaughter side of the plant. (Filing No. 37, Declaration of Thomas Murray ¶ 15; Filing No. 17, Prellwitz Aff. ¶ 2). This was not the first time during DCS's contract with Tyson that Tyson had solicited bids from other cleaning contractors. On previous occasions, the practice between Tyson Foods and DCS was that DCS would not submit a formal bid, but instead, Tyson would consider DCS's current contract to constitute its bid. (Murray Dec. ¶ 17). The Plaintiff has offered hearsay evidence that Chris Rupp, Tyson Foods' Dakota City Plant Manager, stated that the company that wanted the cleaning contract would need to employ Eloy Castillo and his management team, consisting of the other Defendants. (Filing No. 37, Murray Dec. ¶ 16; Shane Nelson Dec. ¶ 19). As a result of the bidding process, Tyson awarded

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(Compare Filing No. 32, Ex. 1, 16-18; 89-90; Ex. 2, 8-9, 46,47; Ex. 3, 13-14, 23-24 *with* Filing No. 37, Ex. 3, Declaration of B. Jaqua at ¶¶ 7,8; and Ex. 4 Declaration of D. Edwardson at ¶¶ 4-7). The Defendants' argument that the matter is moot because DCS did not bid the Tyson contract in 2003, is thwarted given the evidence that Tyson considered DCS's current contract as its "bid," consistent with their previous practice. (Filing No. 37, Ex. 1 Declaration of Thomas Murray ¶ 17). Finally, the doctrine of collateral estoppel does not apply to bar any claim in this case because the doctrine requires that a final judgment on the merits be entered on the particular issue and that has not occurred in any previous case.

[2] PSSI is also known as National Service Company of Iowa.

the new contract for cleaning the processing side of the plant to PSSI. (Prellwitz Aff. ¶ 15). On the first day of the new contract, the Defendants went to work for PSSI at Tyson's Dakota City plant.

The Agreements

The agreements between DCS and each of the Defendants are the same except for the employee signature line. In relevant part, the agreements state as follows:

> 2. Solicitation of Customers: During the term of my employment by the Company and for a period of one (1) year following the date of termination of employment for any reason, I will not request or advise any customer or client of the Company, or any entity or enterprise having business dealings with the Company, to cancel or curtail any business dealings with the Company. The violation of this covenant will irreparably harm Company's business. Accordingly, I will pay to company as liquidated damages 25 percent of the gross revenue received or receivable during the term of this covenant from any customer or former customer of Company as a result of the violation.
>
> * * * *
>
> 4. Noncompetition after termination: For a period of one (1) year following the date of termination of employment for any reason, I will not directly or indirectly engage in, or in any manner be concerned with or employed by any person, firm or corporation in competition with Company or engaged in providing contract cleaning services

within a radius of one-hundred (100) miles of any customer of Company or with any customer or client of Company or any entity or enterprise having business dealings with Company which is then providing its own cleaning services in-house or which request my assistance or knowledge of contract cleaning services to provide its own cleaning services in-house. In the event of violation of this covenant, Company, in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issued by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

5. Confidential Information: Except as specifically authorized by Company, I will not either before or after the termination of my employment with Company, directly or indirectly use, disseminate, disclose, or discuss any information disclosed to or known by me as a result of or through my relationship with Company about Company's processes, services, policies, procedures, prices or customers including without limitation customer lists, employee information, price schedules, know-how concerning the Company's contract cleaning processes, and other trade secrets employed by Company in the course of its business. Upon termination of my employment, I will deliver to Company all records, notebooks, and other documents containing any information described in the proceeding [sic] sentence, and all copies of such documents in my possession or under my control, whether prepared by me, the

> Company, or any third party. In the even of violation of this covenant, Company, in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issued by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

(Filing No. 32, Ex. 4; and Murray Dec. ¶ 26, Exs. A, B, and C).

Summary Judgment

Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1023 (8th Cir. 2003). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the Declarations, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). A "genuine" issue of

material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586.

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Id.* at 249-50 (citations omitted).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327.

Choice of Law Provision

The parties disagree as to what state's law applies to this case. DCS argues that Ohio law applies pursuant to an effective choice of law provision in the agreements, which states, "This Agreement shall be subject to and interpreted in accordance with the laws of Ohio." (Filing No. 32, Ex. 4 at ¶ 8). The Defendants contend that Nebraska law applies, because Nebraska has a materially greater interest in the outcome of the case than does Ohio. Because the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, the Court applies the conflicts-of-laws rules of the forum state, in this case Nebraska, to determine the substantive law that applies to the case. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). See also *Mertz v. Pharmacists Mut. Ins. Co.*, 625 N .W.2d 197 (Neb. 2001).

Nebraska's approach follows the Restatement (Second) of Conflict of Laws. *Inacom Corp. v. Sears, Roebuck and Co.*, 254 F.3d 683, 687 (8th Cir. 2001), citing *Harper v. Silva*, 399 N.W.2d 826, 828 (Neb. 1987). While Nebraska courts generally give effect to parties' contractual choice of law, they recognize an exception to the rule where application of another state's law would violate pubic policy in Nebraska. *Vanice v. Oehm*, 526 N.W.2d 648, 651 (Neb. 1995). *See also First Nat. Bank in Mitchell v. Daggett*, 497 N.W.2d 358, 363 (Neb. 1993), citing *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953) (stating that "[u]nless contrary to public policy, choice-of-law provisions are usually enforced" by Nebraska courts). In following the Restatement (Second) of Conflict of Laws § 187, the Nebraska courts have concluded that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, unless: 1) another state has a materially greater interest in the issue; and 2) the chosen law would violate a fundamental policy of the state with the greater interest." Restatement (Second) of Conflict of Laws § 187(1). See also *JRT, Inc. v. TCBY Systems, Inc.*, 52 F.3d 734, 739 (8th Cir. 1995); *Ermer v. Case Corp.*, 2002 WL 1796438 (D.Neb. Aug 05, 2002). Nebraska courts have not been reluctant to declare a choice of law provision contrary to public policy.[3]

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[3] For instance, in *Daggett*, the Nebraska Supreme Court concluded that Nebraska law should be applied, even though the trust document at issue stated that Georgia law would apply to determine the identity of the trust's beneficiaries. In reaching this conclusion, the Nebraska court found these facts material: 1) the trust was created and executed in Nebraska; 2) the real estate that was held in trust was located in Nebraska; and 3) Georgia had absolutely no contacts with the trust, the parties, or the real estate. *Daggett*, 497 N.W.2d at 363. On another occasion, the Nebraska court refused to give effect to the parties' choice of law provision

In determining whether Nebraska has a materially greater interest in the agreement, the Restatement (Second) of Conflict of Laws § 188(1) incorporates the factors identified in § 6:

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

See Mertz v. Pharmacists Mut. Ins. Co., 625 N.W.2d 197, 202 (Neb. 2001). Using these criteria to evaluate each state's material interest in these agreements, I find that Nebraska has a greater material interest in the agreements at issue in this case than does Ohio. The parties contracted in Nebraska, the only discussions about the agreements occurred in Nebraska, the employment was in Nebraska, the services at issue have been performed in Nebraska, all of the Defendants' domiciles and residences are in Nebraska, the restrictions that were sought by DCS were to be imposed in Nebraska, and DCS is doing business in Nebraska. I have weighed these factors against the factor that DCS is incorporated in and has its corporate headquarters and principal place of business in Ohio. The balance compels the conclusion that Nebraska has a greater material interest in the agreements at issue than Ohio.

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when, to do so, would have required the Court to apply the law of another state to a mortgage foreclosure action affecting real estate located in Nebraska. *Vanice*, 526 N.W.2d at 651-52.

I next consider whether application of Ohio law would violate a fundamental policy of Nebraska. I conclude that it would. Nebraska courts have long held that "[c]ontracts in restraint of trade must conform to the public policy of the State of Nebraska when executed or expected to be performed in this state ...." *Diamond Match Corp. v. Bernstein*, 243 N.W.2d 764, 766 (Neb. 1976). There is no dispute that the agreements at issue were executed and were expected to be performed in Nebraska. In *Mertz*, the Nebraska Supreme Court affirmed that it will "refuse to enforce post-employment covenants not to compete which are broader than reasonably necessary to protect legitimate business interests on the ground that such covenants are against public policy and void." 625 N.W.2d at 203-04 citing *Presto-X-Company v. Belier*, 568 N.W.2d 235 (Neb. 1997). The *Mertz* court found that Nebraska's public policy -- that restrictions on post-employment covenants must not be broader than required to protect the former employer's legitimate business interests -- outweighed another state's interest in protecting the contracting parties' expectations as reflected in the agreement's choice-of-law provision. *Id.* (holding that "Iowa's interest in protecting the expectations of the parties is outweighed by Nebraska's strong public policy considerations on this issue.") See also *Rain and Hail Ins. Service, Inc. v. Casper*, 902 F.2d 699, 700-01 (8th Cir. 1990) (affirming district court's refusal to enforce choice-of-law provision designating Iowa law as governing covenant not to compete because application of Iowa law would be contrary to fundamental policy under Nebraska law).

Under either Ohio or Nebraska law, I suspect the agreements between DCS and the Defendants would be found to be overbroad. Nevertheless, I do not view this as a "false

conflict,"[4] because, having found the agreements' noncompetition provision to be overbroad, the application of Ohio law would permit judicial reformation of the agreements to make them reasonable.[5] Because such judicial intervention has been expressly rejected in Nebraska,[6] I conclude that the

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[4] When the relevant legal principles are the same in both states, "what has come to be called a false conflict" is presented and the court need not resolve the choice of law issue. See *Leonards v. Southern Farm Bureau Cas. Ins. Co.*, 279 F.3d 611, 612 (8th Cir. 2002).

[5] In the Ohio landmark case, *Raimonde v. Van Vlerah*, 325 N.E.2d 544(Ohio 1975), the Ohio Supreme Court stated:

> We hold that a covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect the employer's legitimate interests. A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. Courts are empowered to modify or amend employment agreements to achieve such results.

Id. at 547 *overruling Extine v. Williamson Midwest, Inc.*, 200 N.E.2d 297 (Ohio 1964). The Ohio rule allows the courts to enforce non-competition covenants "only to the extent that the restraints imposed thereby are reasonably necessary to protect the employer's legitimate business interests." *Brentlinger Enterprises v. Curran*, 752 N.E.2d 994 (Ohio App. 2001).

[6] The Nebraska Supreme Courts have expressly rejected that approach. *Vlasin v. Len Johnson & Co.*, 455 N.W.2d 772, 776-77 (Neb. 1990). See also *Terry D. Whitten, D.D.S., P.C. v. Malcolm*, 541 N.W.2d 45, 48 (Neb. 1995)(holding "it is not the function of

parties' choice of law, Ohio, would violate the fundamental public policy of Nebraska, and I conclude that Nebraska law should be applied to determine the validity of the covenants.

Nebraska law

> "[T]here are three general requirements for a valid, partial restraint of trade such as a postemployment covenant not to compete, namely: "First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee." *American Sec. Servs. v. Vodra,* 222 Neb. 480, 486, 385 N.W.2d 73, 78 (1986).

Polly v. Ray D. Hilderman & Co., 407 N.W.2d 751,754 (Neb. 1987). Because I conclude that the agreements are overbroad and, therefore, not reasonable under the second and third general requirements, the agreements cannot be enforced against the Defendants.

The agreements are overbroad because the restrictions are much greater than are reasonably necessary to protect the legitimate business interests of DCS, and are unduly harsh and oppressive on the Defendants. The non-competition provision, which is replete with language in the alternative, can be read to restrict the Defendants 1) from being *"in any*

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courts to reform unreasonable covenants for the purpose of making them enforceable.")

manner be concerned with . . . any person, firm or corporation in competition with the company"; and 2) from "providing contract cleaning services *within one hundred (100) miles of any customer or client of the company* or any entity or enterprise having *business dealings* with company." The language restricts the Defendant from an expansive range of activities, not just contract cleaning services, and it is not limited to customers of DCS with whom the Defendants have had contact. The 100-mile geographical restriction would have stretched the bounds of reasonableness even if it were tied to the Tyson plant in Dakota City, but it is not. The 100-mile geographical restriction seeks to prevent the Defendants from being employed in the contract cleaning service within 100 miles of any of DCS's customers, which the record reveals are located in at least thirteen different states. Murray Dec. ¶¶ 12 and 13. In addition, the 100-mile restriction applies to any entity or enterprise "having business dealings" with the company – which is much broader than simply DCS's customers, and would include attorneys, accountants, delivery services and the like.

I also conclude that the agreements are unduly harsh and oppressive to the Defendants. Despite the Plaintiff's attempt to make the services performed by these unskilled workers sound technical and scientific, the skill at issue is cleaning. (Filing No. 37, Declaration of Shane Nelson ¶ 6). It is not the type of skill that DCS can credibly take credit for developing and honing based on a significant investment of time and capital. (Filing No. 17, Prellwitz Aff. ¶ 7). These Defendants were not well-heeled sales representatives whose job it was to develop and nurture the relationship between DCS and Tyson. They were officers and high level executives who were entrusted with trade secrets and confidential customer information. Their job was and is to clean. I have no doubt

that the Defendants were good employees for DCS, but I am mindful of the Nebraska court's admonition that:

> [A]n employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.

Boisen v. Petersen Flying Serv., 383 N.W .2d 29, 33 (Neb. 1986); See also *American Sec. Services, Inc. v. Vodra,* 385 N.W.2d 73, 78 (Neb. 1986).

For all these reasons, I conclude that the noncompetition provision does not satisfy the second or third requirements for a valid partial restraint-of-trade agreement under Nebraska law. As a matter of law, the Defendants are entitled to summary judgment.

The Eighth Circuit Court of Appeals has affirmed this court's decision to apply Nebraska law in similar situations. In affirming the district court's conclusion that the parties' choice of law would violate Nebraska's public policy, the Eighth Circuit Court observed:

> Although Nebraska law generally allows parties to choose which jurisdiction's law will apply in a contract dispute (here Iowa law), the [district] court nevertheless applied Nebraska law, reasoning that application of Iowa law would be contrary to a fundamental policy of Nebraska. Under Nebraska law, contracts in restraint of trade must be no greater than reasonably necessary to protect the employer in some legitimate interest. *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751,754 (1987). The

> district court found the restrictions of the non-compete clause overbroad because the identity of customers is not a trade secret and Rain & Hail's agreements with the customers are not exclusive. The district court also found the restriction unduly harsh and oppressive to Casper because the agreement was essentially a prerequisite to obtaining the job with Rain & Hail and because Casper had no training in other fields and needed employment.

Rain and Hail Ins. Service, 902 F.2d at 700-01. See also *Ecolab, Inc. v. Morisette,* 879 F.2d 325, 826-27 (8th Cir. 1989)(holding that the district court reasonably concluded that Nebraska courts would not enforce an overbroad covenant, and properly refrained from modifying the covenant in an effort to make it reasonable).

Finally, I address the pending motion for preliminary injunctive relief. The parties' agreements purport to cover the period of only one year following the termination of the employee's relationship with DCS. The evidence is undisputed that the Defendants went to work for PSSI on November 8, 2003. Thus, according to the agreements' own terms, the period affected by the agreements has expired, and I conclude that the motion for preliminary injunctive relief is moot.

DCS argues that under Ohio law, the motion would not be moot because injunctive relief can be imposed post-judgment. That is not the case in Nebraska, and to do so, I conclude, would violate fundamental public policy in Nebraska. The Nebraska Supreme Court recently reiterated that "the nature of injunctive relief . . ." is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury

has been done." *Rath v. City of Sutton,* 673 N.W.2d 869, 879 (Neb. 2004) quoting *Putnam v. Fortenberry,* 589 N.W.2d 838, 842-43 (Neb. 1999).

The Court also acknowledges that DCS represents in its brief that the motion for preliminary injunctive relief was not scheduled until November because of "the demands upon the Court's docket." I note only that from the time the motion was filed on May 20, 2004 (Filing No. 9), until September 2004, DCS made no attempt to schedule a hearing on the motion. By the time that the request to schedule a hearing was made in September 2004, the first available date for the amount of time initially sought by the parties was November 17, 2004, which was already more than a year after the Defendants commenced employment with PSSI. The Plaintiff's counsel was unable to attend on that day because he believed he would be in trial in Ohio on that day, and the Court cancelled the hearing based on a preliminary review of the Plaintiff's motion for preliminary injunction and the Defendants' motion for summary judgment.

For all the reasons stated in this Memorandum and Order,

IT IS ORDERED:

1) Plaintiff's Motion for Leave to File Supplemental Affidavit (Filing No. 44) is granted; the Defendants' Objection (Filing No. 45) is overruled; and the proposed affidavit submitted therewith are deemed part of the record on the motions;

2) Plaintiff's Motion for Preliminary Injunction (Filing No. 9) is denied;

3) Defendants' Motion for Summary Judgment (Filing No. 30) is granted; and

4) A separate judgment will be entered accordingly.

Dated this 14th day of December, 2004.

BY THE COURT:

s/ Laurie Smith Camp
Laurie Smith Camp
United States District Judge

APPENDIX D

DCS SANITATION MANAGEMENT, INC.

AGREEMENT

In consideration of my employment by DCS SANITATION MANAGEMENT, INC. (the "Company"), I agree that:

1. DUTIES OF EMPLOYEE: I will work for the Company in such capacity as it may from time to time direct, will use my best efforts to further the interests of the Company and to contribute ideas, information, and improvements useful to it, and will to the best of my abilities perform such duties as I am directed to perform.

2. SOLICITATION OF CUSTOMERS: During the term of my employment by the Company and for a period of one (1) year following the date of termination of employment for any reason, I will not request or advise any customer or client of the Company, or any entity or enterprise having business dealings with the Company, to cancel or curtail any business dealings with the Company. The violation of this covenant will irreparably harm Company's business. Accordingly, I will pay to company as liquidated damages 25% of the gross revenue received or receivable during the term of this covenant from any customer or former customer of Company as a result of the violation.

3. SOLICITATION OF EMPLOYEES: During the term of my employment by the Company and for a period of one

(1) year following the date of termination of my employment for any reason, I will not, on behalf of myself or on behalf of any other person, firm, or corporation, induce or attempt to influence any employee of Company to terminate employment. The violation of this covenant will irreparably harm Company's business. Accordingly, I will pay to Company as liquidated damages for any employee who terminates employment as a result of the violation of this covenant an amount equal to the employee's compensation for the one-year period ending on the date of the employee's termination of employment with the Company.

4. NONCOMPETITION AFTER TERMINATION: For a period of one (1) year following the date of termination of employment for any reason, I will not directly or indirectly engage in, or in any manner be concerned with or employed by any person, firm, or corporation in competition with the Company or engaged in providing contract cleaning services within a radius of one-hundred (100) miles of any customer of Company or with any customer or client of Company or any entity or enterprise having business dealings with Company which is then providing its own cleaning services in-house or which requests my assistance or knowledge of contract cleaning services to provide its own cleaning services in-house. In the event of violation of this covenant, Company, in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issued by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

5. CONFIDENTIAL INFORMATION: Except as specifically authorized by Company, I will not either before or after the termination of my employment with Company,

directly or indirectly use, disseminate, disclose, or discuss any information disclosed to or known by me as a result of or through my relationship with Company about Company's processes, services, policies, procedures, prices, or customers including without limitation customer lists, employee information, price schedules, know-how concerning the Company's contract cleaning processes, and other trade secrets employed by Company in the course of its business. Upon termination of my employment, I will deliver to Company all records, notebooks, and other documents containing any information described in the proceeding sentence, and all copies of such documents in my possession or under my control, whether prepared by me, the Company, or any third party. In the event of violation of this covenant, Company, in addition to any other rights and remedies available at law or otherwise, is entitled to an injunction to be issues by a court of competent jurisdiction enjoining and restraining employee from committing any violation of this provision and employee hereby consents to the issuance of the injunction.

6. DURATION OF EMPLOYMENT: It is specifically understood and agreed that my employment with the Company may be terminated by either of us at will at any time. Nothing in this Agreement shall be construed as creating the contract of employment for any length of time.

7. ENFORCEMENT AND INTERPRETATION: The obligations of this Agreement shall continue beyond the termination of employment, shall be enforceable at law and in equity, and shall be binding on my heirs, assigns, and legal representatives. If the obligation of any covenant is held to be too broad to be enforced, the covenant shall be construed to create an obligation to the full extend permitted by law.

8. APPLICABLE LAW: This Agreement shall be subject to and interpreted in accordance with the laws of Ohio.

Signed this 23 day of June, 1993

EMPLOYEE:
/s/_____
Employee Signature

_____
Employee Name (printed)

DCS SANITATION MANAGEMENT, INC.
By:/s/_____
Management Signature

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 provides in pertinent part: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Article I, Section 10 provides in pertinent part: "No state shall ... pass any ... law impairing the obligation of contracts ...".

Article IV, Section 1 provides in pertinent part: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Amendment XIV, Section 1 provides in pertinent part: "... nor shall any state deprive any person of life, liberty, or property, without due process of law; ..."